

# The Right to Access Sport for All in Europe

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## ABSTRACT

The right to access sport is connected to the rights to culture, education and leisure in, amongst others, two United Nations core international human rights instruments and the Council of Europe's non-binding Sports for All Charter (1975). Yet, this article demonstrates that the right to access sport is increasingly coupled with the right to health too. Notably, the Council of Europe's revised European Sports Charter (2021) stresses that a 'stand-alone' right to access sport for all is instrumental for health. While requiring considerable resources, investing in this right is ultimately more beneficial than not doing so in Europe.

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*Keywords:* health, Sports for All, culture

## I. INTRODUCTION

'The idea of sport as a human right' is understudied in the literature on sport as well as the literature on human rights.<sup>1</sup> While recognizing the broader

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<sup>1</sup> Simon Pearce, *Disability Discrimination in Children's Sport*, 42 *ALT. L. J.* 143, 145 (2017) rejects the right to sport; A. J. Veal, *Sport and Human Rights: Assessing the Performance of Nation States in Assuring the Right to Sport Participation*, 20/2 *EUR. J. SPORT & SOC'Y* 140, 144 (2023).

range of possible connections between sport and human rights, this paper deliberately narrows its focus to ensure clarity and depth. To begin, this paper focuses on amateur sport, which is ‘less well researched’ than elite sport.<sup>2</sup> Furthermore, I have only two interconnected aims in this paper. I demonstrate (i) that the connection between the human right to access sport and the right to health is recent at the international stage and in the Council of Europe and (ii) that, considering this connection, positive obligations relating to the right to access sport in the Council of Europe are justified.

Sport can be defined as ‘all forms of physical activity that contribute to physical fitness, mental well-being and social interaction’.<sup>3</sup> The connection between sport and health might then seem straightforward. Yet, this is not the case in international and European human rights discourse. On the one hand, the right to access sport is expressly coupled with other rights — the rights to cultural life, leisure and education — in two core international human rights instruments: the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) and the Convention on the Rights of Persons with Disabilities (CRPD) (2006).<sup>4</sup> On the other hand, the Council of Europe’s Sports for All Charter framed sport first and foremost as ‘an aspect of socio-cultural development’ when it expressed for the first time that a stand-alone right to sport for all existed in 1975.<sup>5</sup> In the 21st century, however, the ‘sport for all’ social movement — which created openings for sport in the said legal instruments — achieved new heights. This time around, the right to health takes center stage.<sup>6</sup>

Various sources of international and European human rights law now consider the right to sport as connected to the right to health in the first place. This development fits with the growing attention of other fields to noncommunicable disease prevention, including nutrition, in human rights

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<sup>2</sup> HRC, Report of the UN Special Rapporteur on Health, UN Doc. A/HRC/32/33 para. 22 (2016).

<sup>3</sup> UN Inter-agency Task Force on Sport for Development, *Towards Achieving the Millennium Development Goals 2* (2003).

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, annex, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, arts. 10(g), 13(c) (1979) (CEDAW); Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, annex, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. A/61/49, art. 30(5) (2006) (CRPD).

<sup>5</sup> CM, Resolution on the Principles for a Policy of Sport for All, Resolution (76) 31 App. arts. 1 and 3 (1975). See also CM, Revised European Sports Charter, Rec. No. R (92) 13 Rev., art. 13 (2006).

<sup>6</sup> Sven Messing et al., *Physical Activity as a Human Right?*, 23/2 HEALTH HUM. RIGHTS J. 201, 202 (2021).

discourse.<sup>7</sup> At the international stage, Pūras, UN Special Rapporteur of everyone to the enjoyment of the highest attainable standards of physical and mental health (Special Rapporteur on health) discussed the right to sport in a 2016 report.<sup>8</sup> This followed after the Committee that monitors the Convention on the Rights of the Child (CRC) addressed sport in its General Comment 15 on the right to health (2013).<sup>9</sup> Awareness of the importance of physical activity and sport surged following the restrictions of movement imposed during the COVID-19 pandemic.<sup>10</sup> The Council of Europe now also considers the right to access sport in the first place instrumental in the exercise of the right to health in the revised European Sports Charter (2021).<sup>11</sup>

The relevant international and European human rights law sources refer to positive obligations regarding the right to access sport. While negative obligations require states to refrain from interfering with individuals, positive obligations require steps to ensure human rights enjoyment.<sup>12</sup> Positive obligations are traditionally more controversial because they are often perceived as having a too-far-reaching impact on how governments allocate their scarce resources.

But I argue that the physical and mental consequences of an overly inactive population tax public health systems too much in the Council of Europe. While collecting data on levels of physical activity is notoriously difficult,<sup>13</sup> progress in increased activity in Europe is too slow according to recent estimates from the World Health Organization (WHO).<sup>14</sup> Adult people in Cyprus, Germany and Portugal are the least active in the Council of Europe.<sup>15</sup> 40 per cent of German men and 51 per cent of Cypriot women do not get 150 minutes of moderate-intensity aerobic physical activity or at least 75 minutes of vigorous-intensity aerobic physical activity

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<sup>7</sup> E.g. Aleydis Nissen, 'Offer de Gezondheid van Je Kinderen Niet Aan Slinkse Marketeers', Knack, Jan. 10, 2017.

<sup>8</sup> HRC, *supra* note 2.

<sup>9</sup> Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989); CRC Committee, General Comment No. 15, UN. Doc. CRC/C/GC/15 para. 59 (2013).

<sup>10</sup> Luca Zambelli & Francesco Pegreff, *EU Health Co-Design Policies to Counteract the Covid-19 Pandemic Effect Promoting Physical Activity*, INT'L J. RISK & SAF. MED. 133, 138 (2022).

<sup>11</sup> CM, Revised European Sports Charter, CM/Rec(2021)5 art. 10(1) (2021) (emphasis added).

<sup>12</sup> SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 1 (2008).

<sup>13</sup> WHO, *WHO Guidelines on Physical Activity and Sedentary Behaviour* 22 (2020).

<sup>14</sup> WHO, *Global Status Report on Physical Activity 2022 Country Profiles* (2023).

<sup>15</sup> *Id.*, pp. 134, 210 and 346. No data were recorded for Council of Europe member states Albania, Azerbaijan, Iceland, Liechtenstein, Monaco, Montenegro, North Macedonia and San Marino.

per week.<sup>16</sup> People in Europe are increasingly living sedentary lives due to convenient transport options, increased use of technology for work and leisure and increased academic demands.<sup>17</sup> This has inadvertently made physical activity more of an option than a way of life. Participation in sport has, therefore, never been as important as it is today.

The structure of this paper is as follows. In Part II of this paper, I introduce the emergence of the ‘sport for all’ movement in the 1960s. In Part III, I assess how the right to access sport is formulated in binding instruments in the UN and the Council of Europe. I explain that CEDAW, CRPD and the Council of Europe’s Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) (Istanbul Convention) contain stand-alone provisions on the right to access sport for women and people with disabilities.<sup>18</sup> These provisions are linked to the rights to cultural life, leisure and education. By extension, the right to access sport for all can be derived from these rights, as explained in Part IV of this paper. But, Part V also explains that the right to sport for all can be derived from the right to health, a more recent development. Part VI discusses the stand-alone right to sport in the European Sports Charter (2021). Part VII argues that it is justified to invest resources in the right to access sport in Europe. I also explain the application of the UN Guiding Principles on Business and Human Rights (2011) to sport providers, in accordance with the principle of autonomy of sport.<sup>19</sup>

## II. ‘SPORT FOR ALL’ MOVEMENT

Modern sport developed from traditional games and activities, which often featured prize money or goods.<sup>20</sup> At the turn of the 20th century, sport was decisively amateurish, with a strong discriminatory dimension.<sup>21</sup> While working classes have in practice always engaged in sport activities,<sup>22</sup> sport

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<sup>16</sup> *Id.* does not contain information on muscle-strengthening activities involving major muscle groups. The WHO recommends that adults engage in such activities on at least two days per week.

<sup>17</sup> WHO, *Physical Activity Strategy for the WHO European Region 2016–2025* 3 (2016).

<sup>18</sup> Convention on Preventing and Combating Violence against Women and Domestic Violence, C.E.T.S. No. 210, art. 14 (2011) (Istanbul Convention).

<sup>19</sup> HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31 (2011).

<sup>20</sup> Maarten van Bottenburg, *Why are the European and American Sports Worlds so Different? Path-dependence in European and American Sports History*, in TRANSFORMATION OF MODERN EUROPE: STATES, MEDIA AND MARKETS 1950-2010 205, 214 (Alan Tomlinson et al. eds., 2011).

<sup>21</sup> Bruce Kidd & Peter Donnelly, *Human Rights in Sports*, 35/2 INT’L REV. SOCIOLOGY SPORT 131, 135 (2000).

<sup>22</sup> JAMES WALVIN, *THE PEOPLE’S GAME: THE HISTORY OF FOOTBALL REVISITED* 1 (2nd ed, 2000).

was mainly meant to bring socialization and relaxation to able-bodied men in upper-class heteronormative circles.<sup>23</sup> After the Second World War, sport re-emerged as a discipline-oriented on endurance, competition and standardization.<sup>24</sup> While there were few professional athletes, sport was only for the very best amateurs.

The 'sport for all' movement reacted to this exclusionary interpretation and framed the right to access sport as a human right for everyone. This movement aimed to legally 'change people's hearts and minds' in order to secure the right to access sport for those who were traditionally not the strongest or best *sportmen*.<sup>25</sup> Social movements often employ legal frames to give meaning to events or incidents, ultimately shaping experiences and guiding both individual and collective actions.<sup>26</sup> Legal frames involve the explicit utilisation of the law and provide a profound source of symbolic resources, discourses and institutionalised scripts.<sup>27</sup> Accordingly, the law serves as a language that constantly requires translation from other languages. Vice versa, legal language is translated into the diverse languages that constitute the broader societal context, encompassing domains such as sport, culture, education and health.<sup>28</sup>

The 'sport for all' movement emerged in Europe, with the Council of Europe already confirming the frame that sport for all, benefiting as many people as possible, promoted cultural development in 1966.<sup>29</sup> A right to take part in sport was even included in the Portuguese Constitution in 1976 and in the Spanish Constitution in 1978.<sup>30</sup>

But the 'sport for all' movement had a global outlook from the start. It overlapped, amongst others, strongly with the US civil rights

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<sup>23</sup> HRC *supra* note 8, at 50; Kidd & Donnelly *supra* note 21, at 135.

<sup>24</sup> George Zarotis & Walter Tokarski, *Change of Society Values and the Effects on 'Sports for All'*, 3/5 J. ADV. SPORTS & PHYS. EDUC. 73, 74 (2020).

<sup>25</sup> Cf. Kristin Henrard, *Positive State Obligations Regarding Fundamental Rights and 'Changing the Hearts and Minds'*, 13/3 ERASMUS L. REV. 1, 2 (2020).

<sup>26</sup> David Snow et al., *Frame Alignment Processes, Micromobilization and Movement Participation*, 51/4 AM. SOCIOL. REV. 464 (1986).

<sup>27</sup> Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 11/6 AM. J. SOCIOL. 1718 1727 (2006).

<sup>28</sup> Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44/3-4 LAW & SOC'Y REV. 731, 735 (2010).

<sup>29</sup> CM (1975), *supra* note 5, at 5; Zarotis et al. *supra* note 24, at 74.

<sup>30</sup> Antonio Di Marco, *Conceptualizing the Right to Sport: Why Should Trivial Participation in Sport Be Regarded as a Human Rights?*, in SPORTS AND HUMAN RIGHTS 313, 318 (Véronique Boillet, et al. eds., 1976); Art. 76 Constituição da República Portuguesa (1976); Art. 43, Constitución Española (1978).

movement.<sup>31</sup> Sport for all also mirrored communist sport initiatives in their explicit definition of a sport as a right of the people as well as their call for government support.<sup>32</sup> Cuba was, in particular, an ally for the ‘sport for all’ movement.<sup>33</sup> Cuba constitutionalized the right to ‘physical education, sports and recreation’ in 1976 (following in the footsteps of Article 126 of the Constitution of the Soviet Union), around the time that many countries reopened relations with Cuba.<sup>34</sup> After the Cuban revolution of 1959, Fidel Castro — once a promising baseball player himself — had placed significant focus on the role of sport.<sup>35</sup> Castro saw sport as a means to unify people, improve military and labour forces, determine how leisure time should be filled in, and use ‘athleticism’ to fuel Cuba’s international prestige.<sup>36</sup>

### III. STAND-ALONE RIGHT IN CEDAW AND CRPD

At the end of the 1970s, the ‘sport for all’ movement succeeded in including a stand-alone right to access sport in the Convention on the Elimination of All Forms of Discrimination against Women (1979). This achievement recognized that women do not have equal access to sport in patriarchal societies.<sup>37</sup> They have disproportionate access to resources (including money and time) for sport, caused by the lower value placed on women’s sport, the gender pay gap and a disproportionate share of household responsibilities and care work.<sup>38</sup> As children, girls already have to do a disproportionate amount of domestic chores, which impacts their access to sport.<sup>39</sup> Other barriers to sport are stereotypes that woman are physically and mentally weak and not able to ‘handle’ sport like man do, constraining the empowerment of women and

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<sup>31</sup> S. JANAKA BIYANWILA, *SPORTS AND THE GLOBAL SOUTH* 285 (2018).

<sup>32</sup> April Yoder, *Sport Policy and Political Regimes in Latin America*, in *SPORT IN LATIN AMERICA: POLICY, ORGANIZATION AND MANAGEMENT* 65, 71 (Gonzalo. Bravo et al. eds., 2016).

<sup>33</sup> See *Id.*

<sup>34</sup> A. Di Marco, *supra* note 30, at 318; Art. 126 Constitution of the Soviet Union (1936); Art. 52 Constitución de la República de Cuba (1976).

<sup>35</sup> Julie Marie Bunck, *The Politics of Sports in Revolutionary Cuba*, 20 *CUBAN STUD.* 111, 114 (1990).

<sup>36</sup> *Id.*, 112.

<sup>37</sup> CEDAW Committee, General Recommendation No. 36, UN Doc. CEDAW/C/GC/36 para. 62 (2017); MICHAEL MESNER, *TAKING THE FIELD: WOMEN, MEN AND SPORTS* xxii (2002).

<sup>38</sup> CEDAW Committee *supra* note 37, at 62; HRC, *Intersection of Race and Gender Discrimination in Sport*. Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/44/26 para. 6 (2020); Fareda Banda, *Article 10*, in *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* 253, 269 (Marsha Freeman et al. eds., 2012).

<sup>39</sup> CRC Committee, General Comment No. 20, UN Doc. CRC/C/GC/20 para. 27 (2016).

gender equality.<sup>40</sup> Patriarchal norms sometimes even indicate that women cannot exercise in public spaces.<sup>41</sup> Coverage of women's participation in sport stereotypically considered to be more 'masculine' — such as basketball, weightlifting and boxing — is also more likely to be accompanied by intersecting gendered and racist commentary.<sup>42</sup>

CEDAW changed this on two fronts, cultural life as well as education. On the one hand, article 13(c) CEDAW stresses that state parties shall take all appropriate measures to eliminate discrimination against women to ensure women's right 'to participate in recreational activities, sport and all aspects of cultural life'. During the negotiations of CEDAW, Guyana originally proposed 'leisure and cultural activities' as an aspect of non-discrimination in employment (article 11 CEDAW) in October 1978.<sup>43</sup> Cuba then requested to explicitly mention sport. It suggested changing the wording to 'recreational activities, sports and all aspects of cultural life'.<sup>44</sup> Cuba's proposed amendment to article 11 CEDAW was adopted, but the connection to employment was removed in November 1978 by the Working Group that drafted CEDAW, making explicit that the right to take part in sport should not only be afforded to formally employed women.<sup>45</sup> On the other hand, article 10(g) CEDAW links sport to the field of education. Article 10(g) CEDAW innovated by setting out that state parties shall take all appropriate measures to eliminate discrimination to ensure that women get the 'same opportunities to participate actively in sport and physical education'. This provision was based on the UN Declaration on the Elimination of Discrimination against Women (1967) which did not refer to sport.<sup>46</sup> The reference to sport was included following another amendment proposed by Cuba. The wording was slightly changed, as Cuba originally proposed to include the 'same opportunities to participate actively in sports, physical education

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<sup>40</sup> CEDAW Committee *supra* note 37, at 62; Eric Anderson, 'I Used to Think Women Were Weak': *Orthodox Masculinity, Gender Segregation, and Sport*, 23/2 SOCIOLOGICAL FORUM 257, 271 (2008).

<sup>41</sup> HRC *supra* note 8, at 72.

<sup>42</sup> E.g. CEDAW Committee *supra* note 103, at 38. See HRC *supra* note 38, at 16.

<sup>43</sup> Beate Rudolf, *Article 13*, in Freeman et al. *supra* note 38, at 352; G.A., Draft Convention on the Elimination of Discrimination against Women, UN Doc. A/C.3/33/L.47 para. 126 (1978); LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 150 (1993).

<sup>44</sup> G.A. *supra* note 43, at 127; Rehof *supra* note 43, at 150.

<sup>45</sup> *Id.*

<sup>46</sup> Banda *supra* note 38, at 257; G.A. *supra* note 43, at 48; G.A. Res. 22/2263 (1967).

and the enjoyment of these activities'.<sup>47</sup> Nowadays, all the Council of Europe member states have ratified CEDAW and there are no more reservations of any Council of Europe member state to the right to access sport.<sup>48</sup>

The discussed articles in CEDAW also served as inspiration for a binding positive obligation on sport in the Council of Europe's Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (2011).<sup>49</sup> Article 14 of this Convention refers to education on issues such as equality between women and men, non-stereotyped gender roles and mutual respect. It requires state parties to include such issues in national curricula and 'in informal educational facilities, as well as in sport, cultural and leisure facilities and the media'.<sup>50</sup> This focus is important. Stereotyped masculinist perspectives cultivate violence against women in sport through two processes: misogynist language and the suppression of empathy toward women.<sup>51</sup> Regardless, eight Council of Europe member states have not (yet) ratified the Istanbul Convention.

In 2006, the right to access sport was also added to CRPD. Article 30(5) of this international treaty specifies that state parties shall take appropriate measures with a view to enabling persons with disabilities to participate on an equal basis with others in 'recreational, leisure and sporting activities'. This article was inspired by Standard Rule 11 on the Equalization of Opportunities for Persons with Disabilities (1993).<sup>52</sup> Like this rule, Article 30 CRPD considers the right to participate in sport in the context of cultural life and recreation.

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<sup>47</sup> Rehof *supra* note 43, at 120; G.A., Draft Convention on the Elimination of Discrimination against Women. Cuba: Amendment, UN Doc. A/C.3/33/WG.1/CRP.5 (1978).

<sup>48</sup> CEDAW Committee, Combined Fourth and Fifth Periodic Reports of States parties Ireland, UN Doc. CEDAW/C/IRL/4-5 p. 102 (2003).

<sup>49</sup> Katarzyna Sękowska-Kozłowska, Article 14: Education, in *Preventing and Combating Violence Against Women and Domestic Violence: A Commentary on the Istanbul Convention* 235, 239 (2023).

<sup>50</sup> (emphasis added).

<sup>51</sup> Messner *supra* note 37, at 60.

<sup>52</sup> G.A., Standard Rules on the Equalization of Opportunities for Persons with Disabilities, UN Doc. A/RES/48/96 rule 11 (1993); Ilias Bantekas et al., *Art.30 Participation in Cultural Life, Recreation, Leisure, and Sport*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* 863, 912 (Ilias Bantekas et al. eds., 2018).

Article 30(5) CRPD contains various positive obligations. Amongst others, state parties shall take appropriate measures to ensure that people with disabilities get access to sporting, recreational and tourism venues and services (article 30(5)(c) and (e)). Furthermore, this article contains obligations for inclusion in mainstream as well as disability-specific sport. On the one hand, state parties shall ensure that people with disabilities get the opportunity to participate in, organize and develop disability-specific sport activities. Thereto, article 30(5)(b) stresses that states parties should ‘encourage the provision, on an equal basis with others, of appropriate instruction, training and resources’. In such activities, people with disabilities can compete ‘fairly and safely’.<sup>53</sup> On the other hand, state parties shall ‘encourage and promote the participation... of people with disabilities in mainstream sporting activities at all levels’ (article 30(5)(a)).<sup>54</sup> Shared sport experiences ‘benefit non-disabled people’s understanding of human diversity’.<sup>55</sup> Sport can be beneficial to learn ‘valuable lessons about non-discrimination and inclusivity ... challeng[ing] stereotypes, which helps us to break down barriers in society’.<sup>56</sup> Yet, such considerations need to be nuanced.<sup>57</sup> Discrimination does not stop on the football pitch or stands but is often magnified there requiring specific safeguards.<sup>58</sup> Finally, article 30(5)(d) CRPD also contains an explicit intersectional dimension. It singles out ‘age’ as a marker of difference that intersects with disability. Children with disabilities are a vulnerable group because their self-confidence and independence can be impacted disproportionately due to discrimination during critical developmental stages.<sup>59</sup> Article 30(5)(d) sets out that state parties shall take appropriate measures ‘to ensure that children with disabilities have equal access with other children to participate in play, recreation, leisure and sporting activities, including those activities in the school system’. Equal opportunities to participate in mainstream and disability-

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<sup>53</sup> In the context of children’s rights: CRC Committee, General Comment No. 9, UN Doc. CRC/C/GC/9 para. 72 (2006).

<sup>54</sup> *Id.*

<sup>55</sup> CM, Recommendation on the Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society 2006-2015, Rec(2006)5 para. 3.4.1 (2006).

<sup>56</sup> Commonwealth Forum of National Human Rights Institutions, *Sport and Human Rights*, <https://web.archive.org/web/20200814104240/https://cfnhri.org/human-rights-topics/sport-and-human-rights/>.

<sup>57</sup> *Id.*

<sup>58</sup> HRC *supra* note 38, at 22 and 52; Aleydis Nissen & Rik Raedschelders, Racism, Xenophobia and Related Intolerance in FRANET National Contribution to the FRA Fundamental Rights Report (Belgium) 78-82 (Júlia Zomignani Barboza et al. eds., 2022).

<sup>59</sup> Denise Anderson, *Adolescent Girls’ Involvement in Disability Sport: Implications for Identity Development*, 33/4 J. SPORT & SOC. ISSUES 437–438 (2009); Gerard Masdeu Yélamos et al., *A Thematic Analysis of the UN Convention on the Rights of the Child (CRC) State Party Reporting Mechanisms Related to Physical Education, Physical Activity and Sport*, 29/3 INT’L J. CHILD. RTS. 765 (2021).

specific sport activities ‘must be viewed as both medium of expression and medium of realizing self-satisfying, quality of life’.<sup>60</sup> State parties should ensure that support people are available, but also that more ‘innovative forms of support’ are established.<sup>61</sup> This can, for example, include the use of digital tools for creating shared sport experiences. All Council of Europe member states bar Liechtenstein have ratified the CRPD.

Specific protection continues to be important as (intersectional) discrimination continues to exist in society as a whole. Sporting activities are not yet accessible on an equal basis to those who suffer from discrimination. The WHO 2022 status report on its Global Action Plan on Physical Activity (2018–2030) — which takes a human rights-based and intersectional approach — clearly outlines a gender gap in the Council of Europe member states.<sup>62</sup> In most member states women are less physically active. Furthermore, the status report highlights the lack of data collection on sport for people with disabilities.<sup>63</sup> The positive obligations outlined in article 30(5) CRPD are far from reality. This is not in line with the comprehensive vision of inclusion of the UN Educational, Scientific and Cultural Organization (UNESCO) Kazan Action Plan (2017).<sup>64</sup> This plan links sport policy to the UN sustainable development goals (2015), which also emphasize that sport can promote tolerance and respect.<sup>65</sup> Eliminating direct and indirect (intersectional) discrimination requires temporary special measures accelerating de facto equality to make sport accessible.<sup>66</sup> Temporary special measures can ‘accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour’ in the areas of sport.<sup>67</sup> Such measures are needed as long as necessary to provide available, accessible, acceptable and good quality sport for all, as outlined by the CEDAW and CRPD

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<sup>60</sup> CRC Committee *supra* note 53, at 28.

<sup>61</sup> CRPD Committee, General Comment No. 5, UN Doc. CRPD/C/GC/5 paras. 76 and 94 (2017).

<sup>62</sup> WHO *supra* note 14.

<sup>63</sup> *Id.*, xi.

<sup>64</sup> UNESCO, *Kazan Action Plan* (2017), policy area I.

<sup>65</sup> G.A., Transforming Our World: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 para. 37 (2015).

<sup>66</sup> HRC *supra* note 38, at 20; art. 3(1) CEDAW; art. 5(4) CRPD.

<sup>67</sup> E.g. CEDAW Committee, General Recommendation No. 25, UN Doc A/59/38 para 38 (2004).

committees in their General Comments and Observations. The CRC Committee – as further discussed in Parts 4 and 5 below – has commented on similar measures. For example, a diversity of age-appropriate communication modes that addresses stereotypes is needed to raise awareness of sport for all and the benefits that it entails, including through the media.<sup>68</sup>

#### IV. DERIVATIVE RIGHT TO ACCESS SPORT FOR ALL: CULTURAL LIFE, LEISURE AND EDUCATION

While the right to sport for women and people with disabilities is included in binding conventions, the right to access sport for all is not generally accepted. During the preparation of the 2021 revision of the influential European Sports Charter, scholar di Marco said that the right to sport does not exist.<sup>69</sup> Similarly, during the negotiations of the CRPD, the European Union emphasised that there is no right to sport.<sup>70</sup> However, the right to access to sport for all is fairly established in the UN as well as the Council of Europe. Even the Olympic Charter itself underlines that ‘the practice of sport is a human right’ since 1996.<sup>71</sup> This section explains that this right has most notably been connected to the rights to cultural life, leisure and education, just as in the CEDAW, CRPD and the Istanbul Convention.

First, the right to access sport is linked to the right to cultural life in CEDAW, CRPD and the Istanbul Convention. It has been explained in Part III above that ‘Article 13(c) CEDAW refers to ‘recreational activities, *sports* and all aspects of *cultural life*’, while Article 14 Istanbul Convention requires state parties to include issues such as equality between women and men, amongst others, in ‘*sport, cultural and leisure facilities*’.<sup>72</sup> Similarly, Article 30 CRPD has the heading ‘participation in *cultural life, recreation, leisure and sport*’.<sup>73</sup> The CRPD Committee also stresses in its General

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<sup>68</sup> E.g. CEDAW Committee, General Recommendation No. 36, UN. Doc. CEDAW/C/GC/36 paras. 62 and 63(i) (2017); CRPD Committee, Concluding Observations: El Salvador, UN Doc. CRPD/C/SLV/CO/2–3 para. 57 (2019); CEDAW Committee, Suggestions and Recommendations: Belgium, UN Doc. A/51/38 para. 192 (1996). See also HRC *supra* note 8, at 40; CRC Committee, General Comment 25, UN Doc CRC/C/GC/25 para. 51 (2021).

<sup>69</sup> Council of Europe Enlarged Partial Agreement on Sport (EPAS), Seminar on Human Rights in Sports Report, EPAS(2019)76 p. 10 (2019).

<sup>70</sup> Bantekas et al. *supra* note 52, at 909.

<sup>71</sup> International Olympic Committee (IOC), *Olympic Charter* (Geneva: IOC, 1996), fundamental principle 8; IOC, *Olympic Charter* (Geneva: IOC, 2023), fundamental principles 4 and 6. The Olympic Charter is binding on ‘any person or organization belonging... to the Olympic Movement’ IOC (2023), *Id.*, Rule 1.4.

<sup>72</sup> (emphasis added).

<sup>73</sup> (emphasis added).

Comment 5 on living independently and being included in the community (2017) that ‘accessible ... sports facilities, serve both social and *cultural* purposes’.<sup>74</sup>

Can a broader right to access sport for all also be derived from the right to cultural life? The former UN High Commissioner for Human Rights Al Hussein and Davis answered affirmatively noting that the right to access sport is ‘grounded in’ this broader right in their recommendation to the International Olympic Committee.<sup>75</sup> Inserting itself in the debate on the autonomy of sport law, the CESCR Committee also emphasized that the right to take part in cultural life (article 15(1)(a) CESCR) ‘encompasses, inter alia [...] sport and games’ in its General Comment 21 (2009).<sup>76</sup> It did this again in its first references to the right to participate in sport in Concluding Observations, issued to France and Palestine in 2023. Amongst others, the Committee underscored the significance of ensuring that companies awarded public contracts in Palestine do not unjustly raise prices, thus negatively impacting individuals’ ability to afford ‘cultural activities, including sports’.<sup>77</sup> According to the CESCR Committee, the expression ‘cultural life’ is ‘an explicit reference to culture as a living process’.<sup>78</sup> The connection between sport and access to cultural life finds its roots in the activism of the ‘sport for all’ movement that emerged alongside the wave of pop art, pop music and other manifestations of popular culture, signalling the integration of popular culture into the domain of sport in the 1960s.<sup>79</sup> Sport is a specific part of the heritage of various communities and groups. Greece has ‘pangratiōn’ and the Netherlands has ‘korfbal’. At the same time, sport is a dynamic and evolving concept. Nowadays, sport’s power to express identity online is stronger than ever.<sup>80</sup>

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<sup>74</sup> CRPD Committee *supra* note 61, at 39 (emphasis added).

<sup>75</sup> Zeid Ra'ad Al Hussein and Rachel Davis, *Recommendations for an IOC Human Rights Strategy, Independent Expert Report* 16 (2020).

<sup>76</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 15(1)(a) (CESCR); CESCR Committee, General Comment No. 21, UN. Doc. E/C.12/GC/21 para. 13(a) (2009).

<sup>77</sup> CESCR Committee, Concluding Observations: Palestine, UN Doc. E/C.12/PSE/CO/1, para. 14 (2023). See also CESCR Committee, Concluding Observations: France, UN Doc. E/C.12/FRA/CO/5 para. 61(a) (2023); Aleydis Nissen, *The U.N. CESCR Committee Takes on the Right to Take Part in Sports*, 5 *Diritto dello Sport* (2024).

<sup>78</sup> CESCR Committee *supra* note 76, at 11.

<sup>79</sup> Bart Vanreusel, *Sport is Not for All: Toward a Renewed Future of ‘Sport for All’ as a Right*, in *ETHICS AND GOVERNANCE IN SPORT* 129 (Yves Vanden Auweele et al. eds., 2016).

<sup>80</sup> Veera Ehrlén & Mikko Villi, ‘I Shared the Joy’: *Sport-Related Social Support and Communitality on Instagram*, 35/2–3 *VISUAL STUD.* 260 (2020).

Second, the right to access sport is connected to recreational activities in CEDAW, CRPD and the Istanbul Convention. It has been explained in Part III above that Article 13(c) CEDAW refers to ‘recreational activities, sports and all aspects of cultural life’, while Article 14 Istanbul Convention requires state parties to include issues such as equality between women and men, amongst others, in ‘sport, cultural and leisure facilities’.<sup>81</sup> Article 30 CRPD has the heading ‘participation in cultural life, recreation, leisure and sport’.<sup>82</sup> The CRC Committee also explicitly considers the right to access sport as an element of children’s right to engage in play and recreational activities (article 31 CRC) in its General Comment 17 (2013).<sup>83</sup>

Can a broader right to access sport for all be derived from the right to recreation or leisure? From its inception, the ‘sport for all’ movement considered sporting as a means of pleasure, regardless of good results or high performance.<sup>84</sup> There are no rules, apart from the rule that exploring, experimenting and actively participating are encouraged. This position is also reflected in the non-binding UNESCO International Charter of Physical Education and Sport of 1978, which explains that sport provides ‘wholesome leisure’.<sup>85</sup> The right to leisure is included in article 7(d) CESCR, but this article considers this right exclusively in the context of employment relations.

Third, the rights to access sport and education are linked in CEDAW and the Istanbul Convention. It has been explained in part III above that article 10(g) CEDAW sets out that women should get the same opportunities to participate actively in sport and physical education, while article 14 Istanbul Convention is titled ‘education’. The CRC Committee has also often emphasized that the right to education under article 29(1)(a) CRC includes sport.<sup>86</sup> The foundation for sport practice is built in youth.<sup>87</sup>

Can a broader right to access sport for all be derived from the right to education? Everyone has a right to education under Article 13 CESCR.<sup>88</sup>

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<sup>81</sup> (emphasis added)

<sup>82</sup> (emphasis added)

<sup>83</sup> CRC Committee, General Comment No. 17, UN. Doc. CRC/C/GC/17 p. 6 (2017).

<sup>84</sup> Zarotis et al. *supra* note 24, at 75; Vanreusel *supra* note 79, at 129.

<sup>85</sup> UNESCO, *International Charter on Physical Education and Sport*, SHS/2012/PI/H/1 REV. (1978), art. 2.2.

<sup>86</sup> E.g. CRC Committee *supra* note 83, at 27; CRC Committee, Concluding Observations: Greece, UN Doc. CRC/C/15/Add.170 para. 67(f) (2002); CRC Committee, Concluding Observations: Albania, UN Doc. CRC/C/ALB/CO/5-6 para. 38(f) (2023). See Masdeu Yelamos et al. *supra* note 59.

<sup>87</sup> ANDRÉ CHAKER, *ÉTUDE DES LÉGISLATIONS NATIONALES RELATIVES AU SPORT EN EUROPE* 58 (1999).

<sup>88</sup> CESCR Committee, *Report on the Sixth Session*, UN Doc. E/1992/23 and E/C.12/1991/4 (Nov. 24 – Dec. 13, 1991), p. 58

Education is a means to pursue self-realization and expression.<sup>89</sup> Arguably, the UNESCO Charter on Physical Education and Sport of 1978 makes this connection most clear. This charter already explicated that ‘every human being has a fundamental right of access to physical education and sport, which are essential for the full development of his personality’.<sup>90</sup> The 2015 update explains that ‘every human being has a fundamental right to physical education, physical activity and sport without discrimination’.<sup>91</sup>

## V. DERIVATIVE RIGHT TO ACCESS SPORT FOR ALL: HEALTH

Enjoying culture, leisure and recreational activities and education through sport helps to preserve health,<sup>92</sup> but a more direct connection between the right to access sport and the right to health is not embedded in any of the international human rights conventions. While well-being and quality of life have always been central to the ‘sport for all’ movement, health was initially also not its central focus.<sup>93</sup> Nevertheless, two non-binding Charters of the 1970s already alluded to the connection between sport and health benefits. While the Council of Europe’s Sports for All Charter (1975) framed sport first and foremost as ‘an aspect of socio-cultural development’, it noted that sport shall be related to ‘education, *health*, social service, town and country planning, conservation, the arts and leisure services’.<sup>94</sup> Similarly, the UNESCO Charter of 1978 emphasised that sport was ‘an essential dimension of education and culture’ but also referred to the advantages of sport for the ‘maintenance and improvement of health’, ‘physical well-being’ and ‘well-balanced development of the human being’.<sup>95</sup>

In the 21st century, there is more recognition that sport (especially in groups) — above other forms of physical activity — plays an essential role in health. It reduces symptoms of depression and anxiety and enhances well-being and cognitive functioning.<sup>96</sup> It also plays an important role in the prevention

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<sup>89</sup> Bantekas et al. *supra* note 52, at 874.

<sup>90</sup> UNESCO *supra* note 85. note the androcentric bias in this provision.

<sup>91</sup> UNESCO, *International Charter on Physical Education, Physical Activity and Sport*, SHS/2015/PI/H/14 REV. (2015), art. 1.1.

<sup>92</sup> Rudolf *supra* note 43, at 352.

<sup>93</sup> Zarotis et al. *supra* note 24, at 79.

<sup>94</sup> CM (1975, *supra* note 5, arts. 1 and 3 (emphasis added). See also CM (2006), *supra* note 5.

<sup>95</sup> UNESCO *supra* note 85, preamble and 2.

<sup>96</sup> HRC *supra* note 8, at 10; Petra Jansen & Katharina Dahmen-Zimmer, *Effects of Cognitive, Motor, and Karate Training on Cognitive Functioning and Emotional Well-Being of Elderly People*, 40 FRONTIERS PSYCHOL. 1, 6 (2012); Mark Hamer et al., *Dose-response Relationship Between Physical Activity and Mental Health: the Scottish Health Survey*, 43/14 BR. J. SPORTS MED. 1111, 1112–1113 (2008).

and treatment of substance use disorders.<sup>97</sup> All these benefits come ‘on top of’ other benefits of all forms of physical activity (such as gardening and walking). It contributes to preventing and managing noncommunicable diseases such as type 2 diabetes, some types of cancer and cardiovascular diseases.<sup>98</sup> It improves levels of high-density cholesterol, reduces blood pressure and improves blood glucose level control among people with overweight.<sup>99</sup> Like play, sport ensures healthy growth and development of children.<sup>100</sup> Of course, a nuanced approach is required when discussing the health benefits of sport. The risks of sport — including injuries, doping, drills (especially in schools and the military) and relative energy deficiency in sport (RED-S) — have been studied in both the human rights literature and the sport literature.<sup>101</sup>

In more recent years, the CEDAW Committee has sporadically connected the right to health to sport. To begin, the CEDAW Committee wrote in its General Recommendation 36 on education (2017) that equal opportunities should be available to enjoy the ‘health and psychological benefits’ of engaging in freely chosen areas of physical activity and sport.<sup>102</sup> Similar references can be found in the Concluding Observations of the CEDAW Committee. For example, it recommended the Marshall Islands to ‘develop a healthy lifestyles strategy that ... focuses on sports and other recreational activities ... to combat diabetes’.<sup>103</sup>

While the CRPD and CESCR Committees have not yet made similar connections between sport and health, the CRC Committee also addressed sport in its General Comment 15 on the right to health (2013). It wrote that ‘[i]nformation and life skills education should address a broad range of health issues, including ... sports’.<sup>104</sup> Similarly, this Committee’s General Comment 25 on children’s rights in relation to the digital environment (2021) explains ‘for older children, ... team sports and other outdoor recreational activities can provide health benefits’.<sup>105</sup> The CRC committee has also linked access to sport for children with disabilities to health in many

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<sup>97</sup> UNESCO *supra* note 64, policy area II.1

<sup>98</sup> *Id.*, at 3.

<sup>99</sup> HRC *supra* note 8, at 8.

<sup>100</sup> *Id.*

<sup>101</sup> E.g. *Id.*, at 11; Peter Leggat & Derek Smith, *Military Training and Musculoskeletal Disorders*, 15 J. MUSCULOSKELETAL PAIN 25 (2007); PIERLUIGI RAIMONDO & LUCA ZAMBELLI, DIRITTO DELLE ATTIVITÀ MOTORIE E SPORTIVE App. 1 (2022); Shizuka Torashima et al., *The Necessity of Female Athlete Triad Education For Postpartum Women: a Case Study on Insufficient Health Education*, 181/12 EDIZIONE MINERVA MED. 992 (2022).

<sup>102</sup> CEDAW Committee *supra* note 37, at 62.

<sup>103</sup> CEDAW Committee, Concluding Observations: Marshall Island, UN Doc. CEDAW/C/MHL/CO/1–3 para. 39b (2018).

<sup>104</sup> CRC Committee *supra* note 9, at 59

<sup>105</sup> CRC Committee *supra* note 68, at 109.

Concluding Observations since 2002.<sup>106</sup> It usually considers sport as an element of ‘basic health and welfare’.<sup>107</sup> Since 2006, the CRC Committee has also connected sport and health in other concluding recommendations.<sup>108</sup>

Organs resorting under the UN Charter have also referred to the role of sport in the promotion of health *for all* over the years.<sup>109</sup> Notably, the Human Rights Council considered physical activity and sport ‘among all segments of [states’] population’ as factors contributing to the protection and promotion of the right to health in 2014.<sup>110</sup> The council specifically requested the Special Rapporteur on health to study ‘sport and healthy lifestyles as contributing factors to the right to health’.<sup>111</sup> In the resulting report A/HRC/32/33 of 2016, the Special Rapporteur name-checked the ‘sport for all’ movement recommending states to ‘take steps to secure participation in sport *for all* and the adoption of healthy lifestyles’.<sup>112</sup> Referring to the CESCR’s General Comment 14 on the right to health (2000), he wrote that this right is ‘not confined to the right to health care’, but also includes ‘a wide range of socioeconomic factors that promote conditions in which people can lead a healthy life’.<sup>113</sup> The Special Rapporteur used the well-established ‘respect, protect and fulfil’ prism to explain state obligations regarding sport and healthy lifestyles and the right to health.<sup>114</sup> The obligation to *respect* requires that states refrain from interfering in the enjoyment of human rights. An obligation arises for state parties to attempt to reduce the extent to which individuals adopt unhealthy or risky lifestyles, even if they cannot directly influence individual behaviour.<sup>115</sup> States should, amongst

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<sup>106</sup> E.g. CRC Committee, Concluding Observations: The Netherlands Antilles, UN Doc. CRC/C/15/Add.186 para. 47(b) (2002).

<sup>107</sup> E.g. *Id.*; CRC Committee, Concluding Observations: Belgium, UN Doc. CRC/C/BEL/CO/5–6 para. 30(b) (2019).

<sup>108</sup> CRC Committee, Concluding Observations: Mexico, UN Doc. CRC/C/MEX/CO/3 para. 58 (2006); CRC Committee, Concluding Observations: Nicaragua, UN Doc. CRC/C/NIC/CO/4 para. 65(c) (2010). See also CRC Committee, Concluding Observations: Madagascar, UN Doc. CRC/C/MDG/CO/3–4 para. 52 (2012); CRC Committee, Concluding Observations: Republic of Korea, UN Doc. CRC/C/KOR/CO/5–6 para. 39 (2019); CRC Committee, Concluding Observations: Palau, UN Doc. CRC/C/PLW/CO/2 para. 50 (2018); CRC Committee, Concluding Observations: Liechtenstein, UN Doc. CRC/C/LIE/CO/3–4 para. 32(b) (2023).

<sup>109</sup> E.g. G.A., Sport as a Means to Promote Education, Health, Development and Peace, UN Doc. A/RES/58/5 para. 36 (2003).

<sup>110</sup> HRC, The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Sport and Healthy Lifestyles as Contributing Factors, UN Doc. A/HRC/RES/26/18 para. 3 (2014).

<sup>111</sup> *Id.*, para. 7.

<sup>112</sup> HRC *supra* note 8, at 101(f) (emphasis added).

<sup>113</sup> *Id.*, para. 25 referring to CESCR Committee, General Comment No. 14, UN. Doc. E/C.12/2000/4 para. 4 (2000).

<sup>114</sup> UN Economic and Social Council, Report on the Right to Adequate Food as a Human Right submitted by Asbjørn Eide, Special Rapporteur, UN Doc E/CN.4/Sub.2/1987/23 paras. 67–69 (1987).

<sup>115</sup> HRC *supra* note 8, at 12 referring to CESCR Committee *supra* note 113, at 9.

others, promote the right to sport for all, by disseminating educational and awareness-raising information on sport and healthy lifestyles.<sup>116</sup> The obligation to *protect* requires that states ensure that non-state (private) parties do not violate the human rights of individuals. States should, amongst others, supply training and materials on the adoption of rights-based approaches to health in the sporting context to sport providers.<sup>117</sup> Regarding the obligation to *fulfil*, states should take action to ensure that sufficient resources and infrastructure are devoted to enabling people to access and participate in sport and physical activity. Apart from education, it involves national planning and progressive implementation, expansion and improvement of goods, facilities, services and information provision relevant to sport and healthy lifestyles, subject to resource constraints.<sup>118</sup> States must, amongst others, foster recognition of factors favouring positive health results, and support people in making informed choices about their health.<sup>119</sup>

Finally, the right to access sport has been linked directly to the right to health in the revised European Sports Charter (2021). In 1992, the European Sports Charter of the Committee of Ministers (CM) was born out of the 1975 Sports for All Charter.<sup>120</sup> Like the Sports for All Charter, the 2021 revision again emphasizes that there is a stand-alone right to access sport for everyone.<sup>121</sup> But, the 2021 revision — further discussed in Part VI — also places the right to health at the forefront, noting that the right to access sport is ‘instrumental in the exercise of the rights to *health*, education, culture’.<sup>122</sup> The right to enjoy the highest possible standard of health attainable is embedded in article 11 Revised European Social Charter (1996), which has been ratified by all Council of Europe member states bar Armenia.<sup>123</sup>

## VI. STAND-ALONE RIGHT IN THE EUROPEAN SPORTS CHARTER

I have shown thus far that the right to access sport for all has traditionally been considered as a derivative of the rights to culture, leisure and education, and that it has more recently also been considered as a derivative of the

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<sup>116</sup> HRC *supra* note 8, at 40.

<sup>117</sup> *Id.*, para. 20.

<sup>118</sup> *Id.*, para. 25.

<sup>119</sup> *Id.*, paras. 13, 37 and 40.

<sup>120</sup> CM (1975), *supra* note 5, CM (2006) *supra* note 5.

<sup>121</sup> CM *supra* note 11, art. 10.

<sup>122</sup> *Ibid* (emphasis added).

<sup>123</sup> EPAS *supra* note 69, at 10 referring to European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, art. 11.

right to health. This is particularly clear in the report A/HRC/32/33 of 2016 of the Special Rapporteur on health. I also referred to positive obligations in relevant sources. Part VI of this paper discusses positive obligations in the European Sports Charter (2021) embedded in CM Recommendation CM/Rec(2021)5. This analysis is presented here separately because this is a European instrument that contains a ‘stand-alone’ right to access sport for all. Article 10 of this instrument notes that ‘access to sport for all is considered to be a fundamental right’.

A major goal of the 2021 revision of the European Sports Charter was to provide ‘further guidance on how to advocate the right to access to physical activity and sport for all’.<sup>124</sup> It was the explicit ambition to strengthen the “right to sport” as an entitlement’ and ‘a standard to which member states and sport organisations should look for guidance and inspiration’.<sup>125</sup> There was a level of confusion regarding the extent to which the right to access sport already exists. While a 2019 document of the Enlarged Partial Agreement on Sport (EPAS) (which prepared CM/Rec(2021)5) correctly states that, ‘there is a modesty to refer directly to a right to sport justiciable by international treaties’,<sup>126</sup> EPAS later erroneously alleged that sport is ‘not protected legally as a universal human right nor mentioned in any international declaration or convention’.<sup>127</sup> EPAS then saw a role for the Council of Europe and the European Sports Charter in ‘the emergence of a genuine right to sport’.<sup>128</sup> On the day of the adoption of CM/Rec(2021)5, the CM said that it ‘strongly emphasises the concept of sport for all’ and ‘formulates the principle of a “Right to Sport” that everyone should enjoy’.<sup>129</sup>

Article 10(1) revised European Sports Charter now stresses that ‘all human beings have an inalienable right of access to sport in a safe environment, both inside and outside school settings, which is essential for their personal development’. This article — like the previous versions of the Charter — goes on to emphasize the principle of non-discrimination in sport (article 10(2)). This provision also formulates positive obligations for everyone according to

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<sup>124</sup> EPAS, A European Approach to Sport Policies: The Revision of the European Sports Charter, MSL16(2020)07rev1 (2020), p. 2.

<sup>125</sup> *Id.*

<sup>126</sup> EPAS *supra* note 69, at 10.

<sup>127</sup> EPAS, Human Rights in Sport, MSL16(2020)08rev1, p. 7.

<sup>128</sup> *Id.*

<sup>129</sup> Council of Europe, *Committee of Ministers Adopts Recommendation on the Revised European Sports Charter* (Oct. 13, 2021)

[https://search.coe.int/directorate\\_of\\_communications/Pages/result\\_details.aspx?ObjectId=0900001680a42814](https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680a42814).

their ability in a non-discriminatory fashion, including additional measures that need to be taken for people with disabilities and other disadvantaged individuals or groups (article 10(3)(d)). Three other positive obligations link the right to access sport to the right to education in article 10(3)(a, b, c). To safeguard and promote this right, states have to 'ensure that access to the development of physical, intellectual and ethical competencies through physical education and sport is guaranteed, both within the educational system and in other aspects of social life' (article 10(3)(a)). It is necessary to 'make sure that everyone has ample opportunities to benefit from physical education and practice sport, develop physical literacy and physical fitness, acquire fundamental movement skills and attain a level of achievement in sport which corresponds to their abilities' (article 10(3)(b)). Particular emphasis is added to the rights of older people (article 10(3)(c)). While the right to access sport for all in the Council of Europe has never been limited to children of school age, this life-course approach to this right is more explicit in the 2021 revision. A final obligation is added to the 2021 revision. It is necessary to 'guarantee that local sport clubs have a suitable legal status and framework conditions to offer affordable access to sport for all' (article 10(3)(e)).

While CM Recommendations are non-binding, they can guide change and indicate that there is a definite trend toward a right to access sport. Positive obligations in human rights instruments have a 'proactive function' to guide political and executive decision-making.<sup>130</sup> De Vel and Markert — practising lawyers in the Council of Europe — find that '*the main principles* of a state governed by the rule of law contained in the Recommendations are binding for states on the basis of their having acceded to the Council of Europe Statute'.<sup>131</sup> Even former European Court of Human Rights judges Guerra and Tulkens argued that CM Recommendations cannot be reduced to non-binding soft law.<sup>132</sup> CM Recommendations are not entirely without obligation due to their democratic nature. The key element in determining how hard positive obligations in soft law instruments are is considering

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<sup>130</sup> Fredman *supra* note 12, at 33

<sup>131</sup> Guy de Vel & Thomas Markert, *Importance and Weakness of the Council of Europe Conventions and the Recommendations addressed by the Committee of Ministers to Member States*, in LAW IN GREATER EUROPE: TOWARDS A COMMON LEGAL AREA 352–353 (Bruno Haller et al. eds., 2000) (emphasis added) referring to Statute of the Council of Europe, CETS No.001, arts. 15 and 1(a–b) (1949).

<sup>132</sup> Luis López Guerra, *Soft Law y Sus Efectos En El Ambito del Derecho Europeo de los Derechos Humanos*, 11 TEORÍA Y DER. 151, 157 (2012); Françoise Tulkens et al, *Le Soft Law et la Cour Européenne des Droits de l'Homme. Questions de Légitimité et de Méthode*, 91 REV. TRIM. DROIT H. 433 (2012) referring to *Demir and Baykara v. Turkey*, App. No. 34503/97 (Nov. 12, 2008), <http://hudoc.echr.coe.int/>.

whether they are the result of democratic choices which aspire full and equal participation.<sup>133</sup> The revised European Sports Charter was adopted unanimously during the CM's 1414th meeting in 2021 without debate. One delegation made an interpretative statement and another delegation disassociated themselves from one article of the Recommendation.<sup>134</sup> We do not know until 2032 whether the two delegations targeted article 10 of the Charter, due to the confidential nature of the meeting records. Yet, unanimity has never been required to determine a definite trend toward a right in the Council of Europe, neither for conventions nor for CM Recommendations.<sup>135</sup> Another element speaking for such a trend is that another democratically controlled body, the Council of Europe's Parliamentary Assembly, said in a 2017 resolution that 'sport is perceived as a fundamental right of everyone' and 'everyone should have equal right to engage in physical activity and sport'.<sup>136</sup> It has done so with 120 votes in favor, no votes against, and four abstentions. The main question is whether the observed trend has already crystallized. From a top-down perspective, the length of the process seems to be important.<sup>137</sup> It may be argued that the time has come because the Sports for All Charter — upon which the European Sports Charter is based — already stressed five decades ago that 'every individual shall have the right to participate in sport'. From a more conservative point of view, it can, however, be argued that there has not been sufficient interaction with binding instruments — the CEDAW, CRPD and the Istanbul Convention — to conclude that the soft law character of the Charter has been altered.<sup>138</sup> While EPAS made some limited references to the Istanbul Convention,<sup>139</sup> the CM and EPAS have barely referred to the sport provisions in CEDAW, CRPD and the output of the UN treaty bodies.

## VII. RESOURCES FOR SPORT

This part argues that positive obligations are entirely warranted

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<sup>133</sup> López Guerra *supra* note 132, at 157. See also Fredman *supra* note 12, at 32; M.C. v. Bulgaria, App. No. 39272/98, para. 162 (Dec. 4, 2003), <http://hudoc.echr.coe.int/>.

<sup>134</sup> CM, Synopsis Meeting of Oct. 5, 2021, GR-C(2021)CB5-rev, at 5 (2021).

<sup>135</sup> *Demir*, App. No. 34503/97 at 86; *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11, para. 145 (Nov. 8, 2016), <http://hudoc.echr.coe.int/>.

<sup>136</sup> European Parliament, Resolution of February 2, 2017 on an Integrated Approach to Sport Policy: Good Governance, Accessibility and Integrity, 2016/2143(INI), para. AC (2017)

<sup>137</sup> *Oliari et al. v. Italy*, App. Nos. 18766/11 and 36030/11, paras. 165–166 (Jul. 21, 2015), <http://hudoc.echr.coe.int/>.

<sup>138</sup> See generally ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 213 (2007).

<sup>139</sup> E.g. EPAS, *Breakfast Roundtable: Focus on Combating Gender-Based Violence in Sport* (Mar. 8, 2023) <https://www.coe.int/en/web/sport/-/breakfast-roundtable-focus-on-combating-gender-based-violence-in-sport>.

when considering the right to access sport in the context of health in the Council of Europe. The Special Rapporteur on health Pūras defended positive obligations relating to the right to access sport forcefully by clarifying that removing barriers to participating in sport, rebukes the ‘troubling tendency’ to view engagement in physical activity as a personal or moral obligation.<sup>140</sup> This perspective tends to portray a sedentary lifestyle as a personal failing that should be overcome through sheer willpower. Pūras acknowledged the presence of ‘social and structural determinants’ that dictate such lifestyles.<sup>141</sup> Social contexts — as Fredman argues — play a pivotal role in shaping the choices available to individuals, limiting their options in pursuing ‘the good’ for themselves.<sup>142</sup> The state, as a medium through which the community operates, ‘creates the conditions for valuable autonomy’ of individuals.<sup>143</sup> States’ inaction can impede people’s freedom as much as state interference can.<sup>144</sup> Accordingly, safeguarding individual freedom goes beyond shielding individuals from state interference; it necessitates a ‘positive duty on the State’ to ensure the provision of various options, public goods, and a framework for flourishing human relationships.<sup>145</sup>

Positive obligations remain more controversial than negative obligations because they are thought to entail a far-reaching impact on how governments spend their resources.<sup>146</sup> Subsidies and funds are required to bring ‘cultural goods and services within the reach of all’.<sup>147</sup> As such there are serious questions about ‘how far’ such rights go. Article 30(5)(b) CRPD — discussed in Part III above — also explicitly referred to resource requirements and positive obligations. The UN treaty bodies referred to targeted and responsive budgeting for sport.<sup>148</sup> Similarly, Pūras wrote – as discussed in Part V above – that state parties need to facilitate the use of sporting goods, services, information and facilities.<sup>149</sup> As discussed in Part VI, Article 10(1) revised European Sports Charter also often referred to resources that need to be spent on sport. A state might intervene directly, including by providing subsidies, waiving taxation and training and sensitizing personnel at

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<sup>140</sup> HRC *supra* note 8, at 13.

<sup>141</sup> *Id.*

<sup>142</sup> Fredman *supra* note 12, at 23.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*, p. 25.

<sup>145</sup> *Id.*, p. 18

<sup>146</sup> Aleydis Nissen, A Right to Access to Emergency Health Care: The European Court of Human Rights Pushes the Envelope, 26 *Medical Law Review* 697 (2018).

<sup>147</sup> Bantekas et al. *supra* note 52, at 876.

<sup>148</sup> E.g. CEDAW Committee *supra* note 37, at 62; CEDAW Committee, Concluding Observations: Serbia, UN Doc. CEDAW/C/SRB/CO/4 para. 40(c) (2019); CRC Committee, Concluding Observations: Republic of Serbia, UN Doc. CRC/C/SRB/CO/1 para. 64 (2008); CRPD Committee, Concluding Observations: France, UN Doc. CRPD/C/FRA/CO/1 para. 61(b) (2021). See also HRC *supra* note 38, at 52.

<sup>149</sup> HRC *supra* note 8, at 31.

sporting facilities or financially partner with private or other entities to build facilities to improve availability.<sup>150</sup> While creating time and space for the right to access sport is not limited to directing' money to sport providers, there need to be 'special incentives for private sector support'.<sup>151</sup>

It is increasingly clear that stalling such investments is more costly in the Council of Europe. Economic development, along with modern conveniences and advancements in transportation and technology, has inadvertently made physical activity more of an option than a way of life there.<sup>152</sup> This, in turn, resulted in considerable healthcare costs and social expenses. Excluded and marginalised people, particularly those facing intersecting forms of discrimination, are disproportionately impacted. The economic burden of physical inactivity is significant. While positive obligations have a budgetary impact (and increased participation in sport increases the risk to sport injuries and related costs), such obligations seem not unreasonable in the Council of Europe. WHO estimates that the Council of Europe member states spend an average of EUR 317.829.516 GDP at purchasing power parity of direct healthcare costs on new and preventable cases of noncommunicable diseases and mental health issues associated with physical inactivity.<sup>153</sup> Physical inactivity furthermore leads to loss of productivity in the workplace and reduced employability.<sup>154</sup>

These financial resources can and should be re-channeled to prevention. The Kazan Action Plan sets out that there are strong indications that investment in sport and physical activity generates a competitive return on investment (within one to two years).<sup>155</sup> Therefore, WHO is currently developing methods to provide guidance on the cost-effectiveness of policy actions recommended in its Global Action Plan on Physical Activity.<sup>156</sup>

Any funds provided to sport organisations that respect good governance and human rights should — according to the principle of autonomy of sport — be free from

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<sup>150</sup> *Id.*, at 31 and 36

<sup>151</sup> CEDAW Committee, Concluding Observations: France, UN Doc. CEDAW/C/FRA/CO/9 paras. 40(d) and 39(c) (2023). See also CEDAW Committee, Concluding Observations: Jamaica, UN Doc. CEDAW/C/JAM/CO/8 para. 35(d) (2023).

<sup>152</sup> WHO *supra* note 17, at 3.

<sup>153</sup> WHO *supra* note 14. Exchange rates used are the European Commission's InforEuro rates for January 2023 (EUR 1: USD 1,0649).

<sup>154</sup> Katarzyna Iskra, *Sport* (Apr., 2022)

<https://web.archive.org/web/20230304065624/https://www.europarl.europa.eu/factsheets/en/sheet/143/sport>.

<sup>155</sup> UNESCO *supra* note 64, Annex 2 Action 2.

<sup>156</sup> WHO, Investing in Physical Activity

<https://web.archive.org/web/20240517223538/https://www.who.int/activities/investing-in-physical-activity>.

disproportionate obligations and external constraints. Yet, this does not mean that autonomy can be used as an excuse to disrespect rights. The UN Guiding Principles on Business and Human Rights are increasingly applied to sport providers (also when they are not-for-profit providers).<sup>157</sup> The OHCHR wrote that these principles are a key framework for understanding the nature and scope of state obligations and non-state actor responsibilities with respect to human rights, including in sport.<sup>158</sup> The Kazan Action Plan also stated that the human rights of everyone involved in sport must be protected, respected and fulfilled in accordance with these principles.<sup>159</sup> Article 5 European Sports Charter (2021) explains that governments should promote endorsement of these principles when engaging with representatives of corporate and professional sectors such as ‘the organisation of activities, events or competitions; the manufacturing of sports goods; sports nutrition; construction of facilities; service provision; and the media’.<sup>160</sup>

## VIII. CONCLUSION

Counterintuitively, the right to access sport for all has only fairly recently been coupled to the right to health, opening up new debates on positive obligations. In 2016, the UN Special Rapporteur on health acknowledged the role of sport in promoting healthy lifestyles and protecting the right to health. Furthermore, the 2021 European Sports Charter expresses that health is a particular concern to advance the right to take part in sport for all. While positive obligations linked to the right to access sport can be more easily dismissed when considered as a derivative of the rights to cultural life, leisure or education, serious investments to realize the right to access sport save healthcare systems in Council of Europe member states substantive resources. Council of Europe member states should commit to strategic planning at the governmental level and require public as well as private and other providers to adopt policies that are compatible with human rights standards to make sport available, accessible, acceptable and of high quality for all in a non-discriminatory way.

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<sup>157</sup> HRC *supra* note 19.

<sup>158</sup> HRC *supra* note 38, at 36 referring to HRC *supra* note 19.

<sup>159</sup> UNESCO *supra* note 64, policy area III.

<sup>160</sup> CM *supra* note 11, art. 5(1)